

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0535**

State of Minnesota,
Respondent,

vs.

Justin Kainoa Kaneakua,
Appellant.

**Filed May 8, 2023
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-20-10114

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Peter R. Marker, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Worke, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from judgments of conviction for felony interference with a transit operator and gross-misdemeanor fourth-degree assault, appellant Justin Kainoa Kaneakua challenges the admission of identification evidence at his trial. First, Kaneakua

argues that the district court erred by admitting evidence that the victim identified him as the assailant during a show-up identification procedure—which the district court later found to be impermissibly suggestive—because the identification was unreliable. Second, Kaneakua argues that the district court erred by permitting the victim to make an in-court identification because the identification was tainted by the show-up identification. We conclude that the show-up identification was independently reliable despite the impermissibly suggestive procedure and that the district court therefore did not abuse its discretion by admitting either the show-up identification or the in-court identification. We affirm.

FACTS

Respondent State of Minnesota charged Kaneakua with one count of interference with a transit operator by use of force or violence, in violation of Minnesota Statutes section 609.855, subdivision 2(a) (2018), and one count of fourth-degree assault, in violation of Minnesota Statutes section 609.2231, subdivision 11(a) (2018), based on his assault of a Metro Transit bus driver.

The Incident

On April 3, 2020, R.H. was driving a Metro Transit bus when a man boarded the bus. The man approached the front of the bus several times, crossing under the “swing bar” that separated the bus driver from the passengers. R.H. told the man to move back behind the bar. Although the man moved back and sat down, R.H. kept watch on the man via the rearview mirror. Around the time that the bus was making a scheduled several-minute layover, the man again crossed under the swing bar and approached R.H. The man then

punched R.H. in the face, got off the bus, and walked away. R.H. secured the bus and reported the incident to his supervisors. Officers responded to the scene and interviewed R.H. About 45 minutes later, they conducted a show-up with Kaneakua, during which R.H. identified Kaneakua as his assailant.

Show-Up Identification

Kaneakua filed a motion to suppress R.H.’s show-up identification. Two responding officers—Officers Randall and Tinucci—testified at the omnibus hearing.¹ Because neither Kaneakua nor the state disputes the district court’s factual findings, we incorporate the following facts from the district court’s order on the motion:

At approximately noon on April 3, 2020, a Metro Transit bus driver called 911 to report that he had been assaulted by a bus passenger. He described the attacker as a white male, approximately 6 feet tall and 190 pounds, wearing a grey jacket or hoodie with a brown hoodie underneath, blue jeans, and grey winter hat with a green stripe. The assault occurred in the area of 1st Avenue and Lake Street in Minneapolis. The bus driver reported that the attacker fled north on 1st Avenue after the assault.

Officer Randall, who was a few blocks away when the call went over the dispatch, began looking for the suspect. While doing so, he was flagged down by [Kaneakua] and his sister near the 2700 block of 1st Avenue, a few blocks north of where the assault occurred. [Kaneakua] was in some distress, telling the officer that an intruder was inside his sister’s nearby house and that he had sprayed mace all over the house. [Kaneakua’s] sister told Officer Randall that there was no one in her home and that [Kaneakua] was distressed from drug use and mental health issues.

Officer Randall noted that [Kaneakua] appeared to be Native and 6 feet to 6 feet two inches tall. At the time of this interaction with Officer Randall, [Kaneakua] was wearing a

¹ The district court also reviewed videos from the two officers’ squad cars and Officer Randall’s body-worn camera footage at the omnibus hearing.

white t-shirt, blue jeans, and a beanie. [Kaneakua] also had a tattoo under one of his eyes. Officer Randall spoke with both [Kaneakua] and his sister for some time until he determined that there was no need to continue this investigation. Officer Randall then went to the scene of the assault on the bus.

While Officer Randall was speaking with [Kaneakua], Officer Tinucci responded to the dispatch as well and went to the scene to speak with the bus driver. The bus driver told him that the attacker boarded the bus and while on board, approached the front of the bus a few times. The driver told him to step back when he got too far to the front of the bus. At some point, the attacker punched the driver in the face, got off the bus, and then fled heading north on 1st Avenue. After speaking with the bus driver, Officer Tinucci then went to look for the suspect.

Officer Randall then arrived at the bus and spoke with another Metro Transit Police Officer. While speaking with this officer, Officer Randall asked the other officer to ask the bus driver if the attacker had a tattoo on his face. The bus driver said that he did. Officer Randall now believed that the person he spoke with earlier—[Kaneakua]—was the person who assaulted the bus driver.

Officer Randall then went looking for [Kaneakua] and found him nearby, at the 2600 block of Nicollet Avenue, wearing a short sleeved white t-shirt and jeans. The weather was cold and snowflakes were falling. Officer Randall detained [Kaneakua] in handcuffs and while putting them on he saw a utility knife in [Kaneakua's] pocket. At this point, Officer Randall removed all items from [Kaneakua's] pockets including the utility knife, a can of mace, a wallet and wallet chain, a flashlight, and a bandana. Officer Randall then placed [Kaneakua] in his squad car and coordinated with Metro Transit Police to bring the bus driver to his location to conduct an identification. Officer Tinucci got to the scene before the bus driver and spoke with Officer Randall while they both waited. Officer Randall told Officer Tinucci that he felt “stupid” for not realizing [Kaneakua] was potentially the person who assaulted the bus driver. Officer Randall did not think [Kaneakua] matched the description given by the bus driver.

When the bus driver arrived at the scene, Officer Tinucci spoke with him briefly before conducting the show up. Officer Tinucci told the driver that they “possibly have a

suspect.” He also told the driver that they stopped this person based on his description and that he wanted the driver to take a look at him and determine whether it was the same person who hit him on the bus. Officers Randall and Tinucci then took [Kaneakua], who was still in handcuffs, out of the squad car. Standing on each side of [Kaneakua], the officers held [Kaneakua] by the elbow and presented him to the driver, having [Kaneakua] first face the driver and then turn to the side. The driver then positively identified [Kaneakua] as the person who hit him on the bus. This show-up occurred about 45 minutes after the assault occurred.

The district court denied the motion to suppress. It found that the show-up procedure was unnecessarily suggestive but determined that, under the totality of the circumstances, the identification was independently reliable and thus admissible.

Trial

At the jury trial, R.H. testified about the incident on the bus as well as his identification of Kaneakua. R.H. testified that his assailant was wearing a face covering over the lower part of his face during the assault but that he “got a really good look at his face.” R.H. acknowledged that his first description of his assailant to the police did not mention any tattoo, but he testified that, after officers asked him whether there was anything “distinctive” about his assailant, R.H. told officers that his assailant had a teardrop tattoo under his eye. R.H. testified that he was “confident” about his identification of Kaneakua at the show-up. When the prosecutor asked whether R.H. saw the person who hit him in the courtroom, R.H. identified Kaneakua.

Officer Randall and Officer Tinucci also testified regarding the show-up identification. Their trial testimony was substantially similar to their testimony at the suppression hearing.

The jury found Kaneakua guilty on both counts. The district court entered convictions on both counts and sentenced Kaneakua to a 15-month stayed prison sentence for the felony-interference-with-a-transit-operator offense.

This appeal follows.

DECISION

Kaneakua argues that the district court violated his right to due process by failing to suppress (1) the out-of-court identification because the show-up procedure created a substantial likelihood of irreparable misidentification and (2) the in-court identification because it was tainted by the out-of-court identification.

I. The district court did not err by denying Kaneakua's motion to suppress the show-up identification.

The United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. amend. XIV. "The admission of pretrial identification evidence violates due process if the procedure 'was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). Although evidentiary decisions generally rest within the discretion of the district court, appellate courts review de novo whether a defendant has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

To determine whether an identification procedure violates due process and whether the identification evidence therefore must be suppressed, Minnesota courts use a two-prong test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the court must determine

whether the identification procedure was “unnecessarily suggestive.” *Id.* The court evaluates whether “the defendant was *unfairly* singled out for identification” to determine if “the procedure used by the police influenced the witness identification of the defendant.” *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

Second, if the court determines that the identification procedure was unnecessarily suggestive, the court considers whether the procedure created a “very substantial likelihood of irreparable misidentification.” *Id.* To do so, the court determines whether, under the totality of the circumstances, the identification was otherwise reliable because it had an “adequate independent origin.” *Id.* The court considers five factors: (1) the witness’s opportunity to view the suspect at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the suspect, (4) the level of certainty that the witness demonstrated at the time of the identification procedure, and (5) the time between the crime and the identification procedure. *Ostrem*, 535 N.W.2d at 921.

Here, the district court determined, and the state concedes, that the show-up procedure was unnecessarily suggestive. We therefore need not analyze that question. *See State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (stating that conducting the first part of the *Ostrem* analysis was unnecessary because “the state admits that [the identification] was suggestive”). Instead, we turn to the second prong, addressing each of the five reliability factors in turn.

1. *R.H. had an opportunity to observe his assailant at the time of the crime.*

Kaneakua argues that R.H. had minimal opportunity to observe his assailant at the time of the crime because his assailant was only on the bus for a few stops and he wore a hat and a mask that obscured his face, head, and hair.

Other facts, though, demonstrate R.H.'s opportunity to observe his assailant. The assault took place in the afternoon during daylight hours. *See Ostrem*, 535 N.W.2d at 922 (finding that witness had a sufficient opportunity to view defendant when the encounter occurred during daylight hours from a "relatively close range"). Though he was on the bus for only a few stops, the assailant approached R.H. a couple of times, standing so close to R.H. that R.H. told him to move back. *See State v. Lushenko*, 714 N.W.2d 729, 732 (Minn. App. 2006), *rev. denied* (Minn. Dec. 12, 2006) (finding adequate opportunity when defendant briefly conversed with the witness in person). R.H. also continued to observe his assailant via the rearview mirror even when he was not directly in this line of sight. R.H. also observed his assailant as he ran away after the assault. Because R.H. interacted with his assailant several times in close proximity during daylight, R.H. had sufficient opportunity to observe him. Thus, the first factor weighs in favor of reliability.

2. *R.H. was paying attention to his assailant.*

Kaneakua argues that R.H. was not paying sufficient attention to his assailant to make a reliable identification because he was driving a bus and he was surprised by the punch.

This factor may be met when the witness is “coherent, aware, and attentive” while observing the defendant. *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005). R.H. was acutely aware of his assailant’s presence, telling his assailant to move back because he inappropriately approached R.H. multiple times. R.H. continued to observe his assailant as he fled after punching R.H. in the face. *See Lushenko*, 714 N.W.2d at 733 (noting that a witness’s degree of attention can be heightened by strange or suspicious circumstances). This factor weighs in favor of reliability.

3. *R.H.’s descriptions were generally accurate.*

Kaneakua contends that “R.H. provided inconsistent descriptions of his assailant and, to the extent his descriptions were consistent, they did not match Kaneakua.”

R.H.’s statements show some inconsistency or uncertainty about his assailant’s race and some differences between R.H.’s description of his assailant’s clothing and the clothing that Kaneakua was wearing when confronted by the police. But R.H. provided a generally accurate description of Kaneakua’s build and his tattoo, and his statement regarding his assailant’s direction of travel matched Kaneakua’s later location. The fact that Kaneakua was not wearing outer clothing when confronted by the police could simply have been the result of his having removed it—at the suppression hearing, Officer Randall testified that it is common for suspects to shed clothing. As for Kaneakua’s race, R.H. initially described his assailant as either a black, Hispanic, or Indian male but, after identifying Kaneakua at the show-up, stated, “I couldn’t tell he was Native.” Officer Randall testified that it can be challenging for witnesses to accurately identify a suspect’s race.

Kaneakua also argues that, because R.H. did not mention his assailant's face tattoo until prompted by officers before the show-up, his description was inaccurate. We disagree. It is unclear from the district court order and the testimony at the omnibus hearing what exactly the officers asked R.H. about any facial markings, but even if R.H. was asked about a face tattoo, he correctly said that Kaneakua had a small tattoo under his eye.

Accuracy does not demand perfection. *See Seelye v. State*, 429 N.W.2d 669, 673 (Minn. 1988) (finding that the witness's description was "on the whole, accurate" when the height was wrong and the defendant did not have a mustache, but the witness "accurately described the clothes worn, facial features, complexion, hair and weight"). Overall, R.H.'s descriptions of his assailant were accurate, and this factor weighs in favor of reliability.

4. *R.H. was confident about his identification.*

Kaneakua argues this factor does not support reliability because R.H. did not describe his level of certainty about the identification at the time of the show-up. Kaneakua also argues that R.H.'s statement at the show-up that he "couldn't tell [Kaneakua] was Native" undermines R.H.'s level of confidence in the identification.

When confronted with Kaneakua during the show-up procedure, R.H. gave the officers a thumbs up and stated, "Yeah, that's him. I couldn't tell he was Native. That's him." At the suppression hearing, Officer Tinucci testified that R.H. seemed "certain" of his identification. R.H.'s comment about Kaneakua's race, when read in context, does not undermine his certainty. This factor weighs in favor of reliability.

5. *The time between the assault and R.H.'s identification was short.*

Kaneakua concedes that, because the show-up took place only 45 minutes or so after the incident, this factor weighs in favor of reliability. And we agree. *See Lushenko*, 741 N.W.2d at 733 (finding the temporal factor favored admissibility when three hours had passed between the incident and the identification).

In sum, all five factors support the reliability of the show-up identification. Because, under the totality of the circumstances, R.H.'s identification was independently reliable, the district court did not err by denying Kaneakua's motion to suppress identification evidence despite the impermissibly suggestive show-up procedure.

II. The trial court did not err by admitting R.H.'s in-court identification evidence.

Kaneakua argues that R.H.'s in-court identification of him should have been excluded because it was tainted by the unnecessarily suggestive out-of-court identification of Kaneakua and lacked an adequate independent origin.²

The admissibility of an in-court identification made in the wake of a suggestive pretrial identification procedure is assessed using the same totality-of-the-circumstances analysis for an out-of-court identification. *Seelye*, 429 N.W.2d at 672-73. For the reasons detailed above, under the totality of the circumstances, R.H.'s in-court identification of

² The state argues that we must address the admission of the in-court identification under the plain-error standard of review because Kaneakua failed to object to the in-court identification at trial. Kaneakua counters that he did not need to object to the in-court identification at trial because he objected to all identification evidence in his motion to suppress. We agree with Kaneakua. *See* Minn. R. Evid. 103(a) cmt. (stating that a motion to "prohibit the introduction of evidence operates as a timely objection and obviates the requirement of any further objection with respect to such evidence"). Kaneakua's objection was preserved, and the plain-error standard does not apply.

Kaneakua is independently reliable. The district court therefore did not err by admitting R.H.'s in-court identification of Kaneakua.

Affirmed.